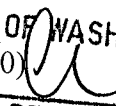


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COURT OF APPEALS  
DIVISION II

2012 MAY 11 PM 1:18

No. 43385-1

STATE OF WASHINGTON  
BY   
DEPUTY  
(Supreme Court No. 86554-0)

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COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION TWO

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CITY OF LONGVIEW, a Washington municipal  
corporation,

Respondent/Cross-Appellant,

v.

MIKE WALLIN, an individual,

Appellant/Cross-Respondent,

BANCAMS.COM, an unknown entity,  
WA CAMPAIGN FOR LIBERTY, a Washington non-profit corporation;  
VOTERSWANTMORECHOICES.COM, an unknown entity, COWLITZ  
COUNTY, a municipal corporation, and KRISTINA SWANSON,  
Cowlitz County Auditor,

Respondents.

---

**APPELLANT'S SUR-REPLY BRIEF**

---

Richard M. Stephens, WSBA No. 21776  
W. Forrest Fischer, WSBA No. 44156  
Attorneys for Appellant/Cross-Respondent,  
Mike Wallin

GROEN STEPHENS & KLINGE LLP  
11100 NE 8th Street, Suite 750  
Bellevue, Washington 98004

Telephone: (425) 453-6206

ORIGINAL

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## INTRODUCTION

### **Wallin's Response to the City's New Argument Regarding the Recent Decision in *Mukilteo***

Wallin submits this sur-reply brief specifically to respond to the City of Longview's *new* argument in Reply Brief of Respondent/Cross-Appellant (City's Reply) regarding the Court's recent decision in *Mukilteo Citizens for Simple Government v. City of Mukilteo*, \_\_\_ Wn.2d \_\_\_, 272 P.3d 227 (2012), issued on March 8, 2012. This decision was issued well after the filing of Wallin's Reply Brief on February 28, 2012.

## ARGUMENT

### ***Mukilteo* is not Dispositive because the Case at Hand Contains Issues Neither Addressed, nor Analyzed, by the Court in *Mukilteo***

On March 8, 2012, the Supreme Court issued its decision in *Mukilteo*, 272 P.3d 227. This case involved whether or not repealing the use of automated traffic cameras was the proper subject for Mukilteo Proposition 1—a proposition that had already been placed on the ballot and voted upon. *Id.* In addition to arguments about standing, the Court was tasked with deciphering whether Proposition 1, *as a whole*, was an exercise of initiative powers or merely an advisory vote. *Id.* at 231-32.

Opponents of the initiative argued that Proposition 1 was “an invalid initiative,” while the City of Mukilteo argued that the proposition was an merely an advisory vote because the City had voluntarily chosen to place it on the ballot regardless of whether it was a valid exercise of the initiative power. *Id.* at 232. Likewise, proponents of the initiative argued

that the matter was properly placed on the ballot as a proper exercise of municipal power, regardless of whether it was a proper exercise of the initiative power. No party argued that Proposition 1 in *Mukilteo* was a proper exercise of the initiative power.<sup>1</sup> Therefore, no party argued that any portion of Proposition 1 in *Mukilteo* should be severed. *Id*

Ultimately, the Court held that “Proposition 1 was historically, in substance, and procedurally an initiative” and that it was beyond the scope of initiative power. *Id* at 233.

In the case at hand, the City of Longview contends that the decision in *Mukilteo* is dispositive because Longview initiative No. 1 is substantially identical to Mukilteo’s Proposition 1, thus rendering “the entirety of Longview initiative No. 1...beyond the scope of the local initiative power.” *City’s Reply*, at 1, 2. However, the City’s argument ignores the applicable rules surrounding the principle of *stare decisis*:

Where the literal words of a court opinion appear to control an issue, but **where the court did not in fact address or consider the issue, the ruling is not dispositive** and may be reexamined without violating *stare decisis* in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.

*ETCO, Inc. v Dep't of Labor & Indus.*, 66 Wn. App. 302, 307, 831 P.2d 1133, 1136 (1992) (emphasis added). Stated more succinctly, “[a]n

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<sup>1</sup> Attached as Appendix A hereto, is a copy of the table of contents of all of the briefs filed in *Mukilteo*. Appellant can also make available the entirety of all briefs filed in that case to confirm that issues in this present appeal, such as severability and the creation of an advisory vote ordinance, were never argued in *Mukilteo*.

opinion is **not authority** for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.” *Continental Mutual Savings Bank v Elliot*, 166 Wn. 283, 300, 6 P.2d 638 (1932) (emphasis added).

In *Mukilteo*, the Court never addressed whether the portion of the initiative which did not interfere with the City’s ability to use traffic cameras, but merely would mandate an advisory vote in the future, was a valid exercise of the initiative power or whether it was severable. Neither party argued these issues, yet they are squarely at issue in the present case.

Additionally, the City’s assertion that in “both the majority and the dissenting opinions in *Mukilteo*, the Court recognized that advisory votes are beyond the scope of the initiative power,” is completely false. *City’s Reply*, at 2. Neither the majority, nor the dissent, analyzed this issue. Instead, the majority analyzed whether the initiative, as a whole, was either itself an advisory vote or a standard initiative. The majority did not rule that it was illegal to have advisory votes, but rather that the initiative in *Mukilteo* was not itself an advisory vote. The dissent focused primarily on the fact that the appeal was moot.<sup>2</sup> *See Mukilteo*, 272 P.3d 227.

In addition to lacking any analysis on whether an initiative could propose an advisory vote, the Court in *Mukilteo* never addressed whether or not provisions within *Mukilteo*’s Proposition 1 were severable and

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<sup>2</sup> Whether Proposition 1 itself was an advisory vote is a different question from the one here, whether an initiative regarding traffic cameras can create an ordinance that requires advisory votes in the future

whether the part of the initiative creating advisory votes was within the scope of the initiative power. These issues were simply never argued.

The case at hand raises both of these issues—the validity of an initiative provision that would establish advisory votes and severability of valid provisions within the initiative. Furthermore, the Court in *Mukilteo* never addressed the issues raised in the present appeal regarding the free speech implications of pre-election review generally and of initiating suit during the signature-gathering phase. Thus, *Mukilteo* is not controlling on issues that were neither presented nor argued and is not dispositive to the case at hand. See *Continental Mutual Savings Bank*, 166 Wn. at 300 (an opinion is **not authority** for what is not mentioned therein).

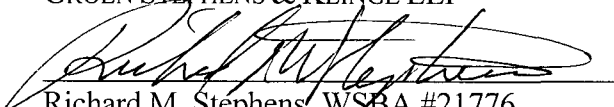
### CONCLUSION

Pursuant to controlling case law governing *stare decisis*, this Court's decision in *Mukilteo* is not dispositive of the case at hand. Wallin respectfully urges the Court to analyze the unique arguments and issues presented in this appeal.

RESPECTFULLY submitted this 9<sup>th</sup> day of May, 2012.

GROEN STEPHENS & KLINGE LLP

By:

  
Richard M. Stephens, WSBA #21776  
W. Forrest Fischer, WSBA #44156  
11100 NE 8th Street, Suite 750  
Bellevue, WA 98004  
(425) 453-6206

Attorney for Appellant, Mike Wallin

### DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On May 9, 2012, I caused the foregoing document to be served upon the following persons via the following means:

Stephen C. Shuman  
City of Longview  
1525 Broadway St.  
P.O. Box 128  
Longview, WA 98632-7080

☐ Hand Delivery /Legal Messenger  
☒ First Class U.S. Mail  
☐ Federal Express Overnight  
☐ E-Mail:  
stephen.shuman@ci.longview.wa.us

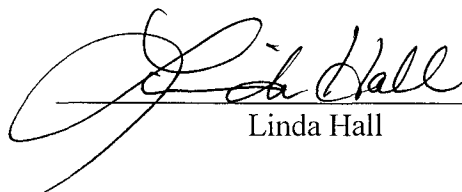
P. Stephen DiJulio  
Roger A. Pearce  
FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299

☐ Hand Delivery /Legal Messenger  
☒ First Class U.S. Mail  
☐ Federal Express Overnight  
☐ E-Mail: DiJup@foster.com  
pearr@foster.com

Douglas E. Jensen  
Chief Civil Deputy  
Cowlitz Co. Prosecuting Attorney  
312 SW 1<sup>st</sup> St.  
Kelso, WA 98626-1739

☐ Hand Delivery /Legal Messenger  
☒ First Class U.S. Mail  
☐ Federal Express Overnight  
☐ E-Mail:  
☐ Facsimile: \_\_\_\_\_

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9<sup>th</sup> day of May, 2012 at Bellevue, Washington.

  
\_\_\_\_\_  
Linda Hall



# APPENDIX A

Supreme Court No. 84921-8

Snohomish County Superior Court No. 10-2-06342-9

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

Mukilteo Citizens for Simple Government,

Appellant,

v.

City of Mukilteo, Christine Boughman, Snohomish County,  
Carolyn Weikel, Nicholas Sherwood, Alex Rion, Tim Eyman,

Respondents.

---

**APPELLANT'S OPENING BRIEF**

---

Vanessa S. Power, WSBA #30777  
Leonard J. Feldman, WSBA #20961  
Gloria S. Hong, WSBA #36723  
STOEL RIVES LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
Tel: (206) 624-0900  
Attorneys for Appellant Mukilteo  
Citizens for Simple Government

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Supreme Court No. 84921-8

Snohomish County Superior Court No. 10-2-06342-9

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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Mukilteo Citizens for Simple Government,

Appellant,

v.

City of Mukilteo, Christine Boughman, Snohomish County,  
Carolyn Weikel, Nicholas Sherwood, Alex Rion, Tim Eyman,

Respondents.

---

**APPELLANT'S REPLY BRIEF**

---

Vanessa S. Power, WSBA #30777  
Leonard J. Feldman, WSBA #20961  
Gloria S. Hong, WSBA #36723  
STOEL RIVES LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
Tel: (206) 624-0900  
Attorneys for Appellant Mukilteo  
Citizens for Simple Government

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SUPREME COURT NO. 84921-8  
SNOHOMISH COUNTY SUPERIOR COURT NO. 10-2-06342-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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Mukilteo Citizens For Simple Government,

Appellant,

v.

City of Mukilteo, Christine Boughman, Snohomish County,  
Carolyn Weikel,

Respondents,

and

Nicholas Sherwood, Alex Rion, Tim Eyman,

Respondent Intervenors.

---

BRIEF OF RESPONDENTS CITY OF MUKILTEO AND  
CHRISTINA BOUGHMAN

---

Angela S. Belbeck, WSBA #24482  
Attorney for Respondents City of  
Mukilteo and Christina Boughman  
Ogden Murphy Wallace, P.L.L.C.  
1601 Fifth Avenue, Suite 2100  
Seattle, Washington 98101-1686  
Tel: 206.447.7000/Fax: 206.447.0215

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No 84921-8

(Snohomish County Superior Court  
No. 10-2-06342--9)

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

MUKILTEO CITIZENS FOR SIMPLE GOVERNMENT,

Appellant/Plaintiff,

v.

CITY OF MUKILTEO, CHRISTINE BOUGHMAN, SNOHOMISH  
COUNTY, and CAROLYN WEIKEL,

Respondents/Defendants,

and

NICHOLAS SHERWOOD, ALEX RION AND TIM EYMAN,

Respondents/Intervenor-Defendants.

---

**BRIEF OF RESPONDENTS/INTERVENOR-DEFENDANTS**

---

Richard M Stephens, WSBA #21776  
Attorney for Respondents/Intervenor-Defendants,  
Nicholas Sherwood, Alex Rion, and Tim Eyman

GROEN STEPHENS & KLINGE LLP  
11100 NE 8th Street, Suite 750  
Bellevue, WA 98004  
Telephone. (425) 453-6206



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